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COMMENT ON RECENT JUDICIAL DECISIONS.

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Cruel and Unusual Punishment.—A case recently decided by the United States Supreme Court has excited a great deal of comment throughout the country. The point that was passed upon was so novel, and the subject matter so unusual, that even a layman stopped to read the comments he found in his daily paper.

The case was that of *Weems v. United States*. There the court was called upon to pass upon the meaning and construction of a provision in the Bill of Rights of the Philippine Islands similar to the eighth amendment to the Federal Constitution, which provides that:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The plaintiff in error, Weems, was the acting disbursing officer of the bureau of coast guards and transportation of the government of the Philippine Islands. He was indicted because he corruptly and with intent to deceive and defraud the government, did falsify the records and cash book of the captain of the board of Manila, the bureau of coast guards and transportation. He was found guilty and the court thereupon imposed upon him the following sentence: To the penalty of 15 years of 'Cadena' and to pay a fine of 4,000 pesetas.

By the provisions of the code prevailing in the Philippine Islands, a man who is bound to serve "Cadena" punishment must always carry a chain at the ankle, hanging from the wrist, and be employed at hard and painful labor. Besides this punishment certain civil disabilities are inflicted upon him, which it is not necessary to mention here.

An appeal was taken from the supreme court of the Islands to the United States Supreme Court and it was there urged that this sentence violated the provision of the Bill of Rights of the Islands, which forbids the infliction of cruel and unusual punishment.

The court seemed to be of the opinion that punishments are cruel when they involve torture or a lingering death; that "such a punishment implies something inhuman and barbarous," and that the punishment in this case was cruel in its excess of imprisonment and unusual in its character. Thus it said:

"The court recognizes the difficulty of defining accurately what is meant by cruel and unusual punishment."

And further that:

"There are degrees of homicide that are not punished so severely, nor are the following crimes: Misprision of treason, inciting rebellion, conspiracy to destroy the government by force, recruiting soldiers in the United States to fight against the United States, forgery of letters patent, forgery of bonds and other instruments for the purpose of defrauding the United States, robbery, larceny and other crimes."

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The court also pointed out that in the Philippine Islands more heinous crimes were not more severely punished than the crime in this case, and declared :

"In other words, the highest punishment possible for a crime which may cause the loss of many thousands of dollars and to prevent which the duty of the state should be as eager to prevent as the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account. And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The state thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting severity, its repetition is prevented, and hope is given for the reformation of the criminal."

Justice White wrote a very powerful dissenting opinion. He said he felt that the court was confusing the meaning of harshness of punishment with the phrase "cruel and unusual punishment." He pointed out that what was a cruel and unusual punishment had to be determined by the custom that had been in force at any particular time and place, and that during the Spanish reign of the Philippines this punishment was not considered an unusual or a cruel one. He showed that the provision in reference to cruel and unusual punishment was originally taken from the well-known act of Parliament of 1689, and that this Act was in regular form a consequence of the Declaration of Rights of the same year; that the cruel punishments against which the Bill of Rights provided were the atrocious and inhuman punishments that had been inflicted in the past upon the persons of criminals, and that the unusual punishments provided against were certain illegal punishments that had been complained of. These complaints were :

First—That customary modes of bodily punishment such as whipping and the use of the pillory had been applied to so unusual a degree as to cause them to be illegal ; and,

Second—That in some cases an authority to sentence to perpetual imprisonment had been exerted under the assumption that power to do so resulted from the existence of judicial discretion to sentence to imprisonment, when it was unusual, and that therefore it was illegal to inflict life imprisonment in the absence of express legislative authority. He said that the prohibitions, although conjunctively stated, were really disjuncted and embraced the following :

a. Prohibitions against a resort to the inhuman bodily punishments of the past.

b. Or where certain bodily punishments were customary, a prohibition against their infliction to such an extent as to be unusual and consequently illegal.

c. Or the infliction under the assumption of the exercise of judicial discretion, of unusual punishments not bodily, which could not be imposed except by express statute, or which were beyond the jurisdiction of the court to impose.

That in England it was nowhere deemed that any theory of proportional punishment was suggested by the Bill of Rights or that a protest was thereby intended against the severity of punishments.

Justice White further declared that the first "Crimes Act" of the United

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States prescribed punishment for crime utterly without reference to any assumed rule of proportion or of a conception of a right in the judiciary to supervise the action of Congress in respect to the severity of punishment, excluding always the right to impose as a punishment cruel bodily punishments which were prohibited.

"From all the citations which have been stated," he continued, "I can deduce no ground whatever which, to my mind, sustains the interpretation now given to the cruel and unusual punishment clause; on the contrary, in my opinion, the review which has been made demonstrates that the word 'cruel' as used in the amendment forbids only the law-making power, in prescribing punishment for crime and the courts in imposing punishment, from inflicting unnecessary bodily suffering through a resort to inhuman methods for causing bodily torture, like or which are of the nature of the cruel method of bodily torture which had been made use of prior to the Bill of Rights in 1689, and against the recurrence of which the word 'cruel' was used in that instrument."

He further said that the decision of the majority in this case is in direct conflict with the conception that, what is generically included in the words employed in the Constitution, is to be ascertained by considering their origin and their significance at the time of their adoption into the constitution.

By the interpretation now adopted by the court, two results are accomplished. Justice White asserted:

a. The clause against cruel punishments, which was intended to prohibit inhumane and barbarous punishments, is so construed as to limit the discretion of the law-making power in determining the mere severity with which punishments not of the prohibited character may be prescribed, and

b. By interpreting the word "unusual" adopted for the sole purpose of limiting judicial discretion in order thereby to maintain the supremacy of the law-making power, so as to cause the prohibition to bring about the directly contrary result, that is, to expand the judicial power by endowing it with a vast authority to control the legislative department in the exercise of its discretion to define and punish crime.

If the Supreme Court in this decision had in mind the idea that any punishment was cruel and unusual where the punishment was not in proportion to the crime, it certainly has taken a new and advanced step in the interpretation of the eighth amendment—an interpretation which revolutionizes all theories of punishment that have ever prevailed.

There probably never was a legislative body that could with absolute justice proportion punishment to the crime, and where as we, in the United States, have a complex system of government, with the legislatures of many different states having full sovereign right to determine the length of imprisonment or punishment to be meted out to every offender, the problem becomes an almost helpless one.

In one state grand larceny may be punished by imprisonment of from 5 to 20 years, whereas in another state for committing the same offense, the criminal can be sentenced from 1 to 5 years. In one state, a jury whose sympathies are most violently appealed to, determines the sentence; in another state a judge, without any great experience in criminal matters, determines how long the victim must stay in the penitentiary.

Who can determine whether it is a more serious crime to commit the act

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of forgery than that of larceny? Who is to say whether burglary or perjury should be the more severely condemned? Who is willing to pass upon the merits or demerits by which a man is to be judged, should he be found guilty of obtaining goods by false representations on the one hand, or of committing embezzlement on the other.

If we are to take literally the opinion of the Supreme Court and say that the legislature must fix the punishment according to the heinousness of a crime, an almost insurmountable obstacle is confronting the administration of the criminal law. It may be that we are coming to the time when punishments will be standardized. Possibly we shall some day come to the opinion that a judge who occasionally sits in the criminal court should not determine what a sentence may be, much less a jury who happens to hear only an occasional case.

This is the day of commissions, and possibly we may feel that civilization will be further advanced and justice at all events promoted by having a commission to determine the punishment of the criminal, and to unify the laws so far as they relate to mere punishment.

Insanity as a Defense.—In the case of *People vs. Coleman*, 91 N. E. 368, the court held that an affidavit on which a motion for a new trial was based where the question of sanity of the defendant was first raised, containing an unqualified assertion that the defendant was insane did not rise to the dignity of evidence, indicating that the defendant's mind was so affected that he did not know the nature and quality of the act he committed; or did not know that it was wrong.

The question of the sanity of the defendant was not raised until after the trial. This case can hardly be said to be an authority on the question of insanity. The court did not find it necessary nor did it attempt to go into a careful discussion of the law bearing on insanity.

In the case of *Snell vs. Weldon*, 243 Ill. 496, the plaintiff in error attempted to set aside the will of the testator, Thomas Snell, on the grounds that the testator was not of sound mind and memory and had insane delusions regarding the complainant.

On this point the court said:

"The establishment of an insane delusion involves proof that the testator in this case believed certain things concerning his son which did not exist; that he had no evidence on which to base such belief; that the things which he believed, were false and were adhered to by the testator after their falsity had been shown by reasonable evidence; that the things which the testator believed were such things as no person of sound mind would believe; that the testator refused to yield or give up such irrational belief in the face of such reasonable evidence as would convince an ordinarily sound and healthy mind; and lastly, that the existence of such delusion was present in the mind of the testator and exercised a controlling influence over him at the time the will was executed."

It might be interesting to discuss the question whether the same tests are always applied to determine whether a man is insane. Could a man, for example, be found insane so far as the commission of a crime might be concerned, and at the same time be found sane so far as the making of a will might be in question.

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Of course, if the rigid rules of the M'Naghten case are to be applied, it would seem that the standard would be the same in either case. However, some progress has been made since that case was decided and most jurisdictions no longer hold that the only test to determine a man's sanity is whether he knows right from wrong.

The courts of most jurisdiction today are willing to concede that a man who has an uncontrollable impulse, which compels him to do what otherwise he would not do, is of unsound mind, and that an act committed by a man so impelled, is not criminal. A man laboring under such an impulse is generally regarded from the point of view of criminal law, as incapable of committing a crime.

It may, however, be doubted, whether the will of the victim of such an impulse would be set aside unless it were shown that the impulse was such as to impel the victim to have made a will contrary to his own volition. Nor would it seem likely that a will could be made under such circumstances for the reason that wills are not made on the spur of the moment. A lawyer, as a rule, is consulted. A day or more generally elapses between the time the idea is broached to the attorney and the time when it is signed. Under such circumstances, it would be rather difficult to establish the fact that the document was signed because of some uncontrollable impulse. It would seem, consequently that different standards and tests might be applied to determine the question of insanity in a criminal and in a civil case.

In the case of *Smith vs. State*, 49 Southern 949, the court held the following to be a correct instruction on the question of the defendant's sanity:

"The court charges the jury for the state: The defense of so-called moral or emotional insanity or irresistible impulse, where the defendant's mental power to distinguish between moral right and wrong with respect to the act for which he is indicted remains unimpaired, is not recognized by the law of the state; and you are accordingly instructed that you have no right to regard any such insanity as a legal excuse for crime. If the defendant commits a crime under an uncontrollable impulse resulting from mental disease, and which, at the time and place of the alleged crime, exists to such a high degree that for the time it overwhelms his reason, judgment and conscience, and his power to properly perceive the difference between the moral right and wrong of the alleged criminal act, this would, of course, be a legal defense and excuse for such an act. But where the defendant, at the time of an alleged crime, is sane to the degree that he can properly perceive the difference between moral right and wrong with respect to the particular act, and knows that it is morally wrong for him to do the said act, then the mere fact that an alleged irresistible or emotional impulse constrained him to commit the act which he then properly perceived was morally wrong, will not, and cannot, amount to a defense for crime in this state, and you are so instructed.

The court said:

"Whereas the defense is insanity, total or partial, the test of the defendant's criminal responsibility is his ability at the time he committed the act, to realize and appreciate the nature and quality thereof—his ability to distinguish right and wrong."

This, in other words, is practically going back to M'Naghten's case. We had thought that our American Courts in recent years had been getting away from the "right and wrong test" as laid down in M'Naghten's case, and had

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hoped that they were willing to follow the medical profession and to accept the tests laid down by it in determining a man's sanity.

After all, why is a man excused and held not guilty in the commission of crime if he is found insane? Why do we set up different standards and tests for the sane and the insane? Is not the underlying reason that the sane man, according to the theory of our common law, has a free will and can determine and choose for himself, while the insane man has not this freedom of will. According to the common law the man who lacks a free will, lacks the ability to have criminal intent. If he can not distinguish between right and wrong, the freedom of will and the intent is certainly lacking. Is it not as certainly lacking in a case where the poor victim is seized with an irresistible influence which impels him to do something which, if his will were free, he would not do? In either case, the fundamental element of freedom of the will is not present and because of its absence, criminal intent is lacking. Why should a court hold a man guilty under such circumstances?